Supreme Court, U.S.
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NO. 85-220

IN THE

Supreme Court Of The United States

October Term, 1985

BURLINGTON NORTHERN RAILROAD COMPANY,

Petitioner,

vs.

HON. MARVIN CHERNER, JUDGE OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

WHETHER THE FEDERAL EMPLOYERS' LIABILITY ACT REQUIRES A JURY TRIAL ON THE QUESTION OF WHETHER A CONSENT JUDGMENT WAS PROCURED BY THE FRAUD OF THE RAILROAD, NOTWITHSTANDING THE FACT THAT ALABAMA EQUITY PRACTICE STIPULATES A NON-JURY TRIAL ON AN ACTION TO SET ASIDE A JUDGMENT.

PARTIES TO THE PROCEEDING

Parties:

Nettie Faye Duckworth Warren, administratrix of the Estate of James B. Duckworth
Burlington Northern Railroad Company
Judge Marvin Cherner, sitting as Judge of the Tenth Judicial Circuit of Alabama

Affiliated or related parties:

The parent company to Burlington Northern Railroad Company is Burlington Northern, Inc., which owns all the stock in the Burlington Northern Railroad Company. The following companies are affiliated with the Burlington Northern Railroad Company:

The Belt Railway Company of Chicago
The Camas-Prairie Railroad Company
Davenport, Rock Island & Northwestern Railway Company
Galveston Terminal Railway Company
Houston Belt and Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
The Lake Superior Terminal Transfer Railway Company
Longview Switching Company
Minnesota Transfer Railway Company
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Pueblo Terminal Union Depot and Railroad Company
St. Paul Union Depot Company
Terminal Railroad Association of St. Louis
Trailer Train Company
Wichita Union Terminal Railway Company
Winona Bridge Company

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 4

1. Alabama equity law does not apply. 4
2. Federal law requires a jury trial in FELA cases. 6
3. This FELA action is not barred by the principles of res judicata. 6
4. Consent judgments and releases are treated identically under the FELA. 7
5. Title 45 U.S.C. §55 guarantees a FELA claimant a right to trial by jury in this instance. 8

CONCLUSION 10

APPENDIX:

A – SUMMONS AND COMPLAINT A-1

B – PLAINTIFF'S FIRST AMENDMENT TO COMPLAINT A-7

C – MOTION TO TRANSFER A-11

D – ORDER GRANTING MOTION TO TRANSFER A-15

E – MOTION TO STRIKE A-17

F – PRE-TRIAL ORDER A-20

G – APPLICATION FOR REHEARING A-36

H – APPLICATION FOR REHEARING DENIED A-38

TABLE OF AUTHORITIES

Cases: *Page*

Bailey v. Central Vermont Railway Company, Inc., 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444 (1943) 5, 9, 10

Brown v. Western Railway of Alabama, 338 U.S. 294, 70 S.Ct. 105, 94 L.Ed. 100 (1949) 10

Chesapeake & Ohio R. Co. v. Kuhn, 284 U.S. 44, 52 S.Ct. 45, 76 L.Ed. 157 (1931) 6

Dice v. Akron, Canton & Youngstown R. Co., 342 U.S. 359 (1952) 4, 5, 6, 7, 8, 9, 10

Duncan v. Thompson, 315 U.S. 1, 62 S.Ct. 422, 86 L.Ed. 575 (1942) 8, 9

Hazel-Atlas Glass Company v. Hartford-Empire Company, 322 U.S. 238 (1944) 6

Krasner v. Reed, 30 So.2d 731, 734, 33 Ala. App. 85, pet. for cert. dismissed 30 So.2d 734, 249 Ala. 240 (1947) 7

Riehle v. Margolies, 279 U.S. 218, 49 S.Ct. 310, 73 L.Ed. 669 (1928) 6

Ricketts v. Pennsylvania R. Co., 153 F.2d 757, 759 (2nd Cir. 1946) 6

Urie v. Thompson, 337 U.S. 181, 182, 69 S.Ct. 1018, 93 L.Ed. 1282, 11 A.L.R. 2d 252 (1949) 8

Statutes:

45 U.S.C. §51 ..... *passim*

45 U.S.C. §55 ..... 8, 9, 10

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BURLINGTON NORTHERN RAILROAD COMPANY,
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vs.

HON. MARVIN CHERNER, JUDGE OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

STATUTORY PROVISIONS

Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the

surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C. §51.

* * * * * *

Contract, rule, regulation, or device exempting from liability; set-off.

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the employee or the person entitled thereto on account of the injury or death for which said action was brought.

45 U.S.C. §55.

STATEMENT OF THE CASE

Nettie Faye Duckworth Warren, administratrix of the Estate of James B. Duckworth, brought suit in the Tenth Judicial Circuit Court of Alabama against St. Louis-San Francisco Railway Company, Burlington Northern Railway Company (the

"Railroad"), and Kershaw Manufacturing Company ("Kershaw"). Burlington Northern is successor corporation to St. Louis-San Francisco Railway Company. Plaintiff alleges in her complaint that her deceased husband was killed while working as a laborer for the Railroad. Plaintiff alleges that his death was proximately caused by the negligence of the Railroad and that the action is brought pursuant to the provisions of the Federal Employers' Liability Act, 45 U.S.C. §51, et seq. (FELA). The complaint avers that Kershaw is liable under the provisions of the Extended Manufacturer's Liability Doctrine. She further avers that on January 2, 1980, a consent judgment was entered in the case of *Nettie Faye Duckworth v. St. Louis-San Francisco Railway Company and Kershaw Manufacturing Company*, CV-80-02, in the Circuit Court of Walker County, Alabama, for the amount of $151,500.00, and that such judgment was procured by fraud on the part of the Railroad and Kershaw and is thus null and void. (Appendix A&B)

The Railroad moved to dismiss her complaint alleging that fraud had not been stated with particularity. It also filed a Motion to Transfer to Equity alleging that an independent action to set aside an earlier "judgment" is an equity action. (Appendix C). On May 12, 1982, the trial court granted the Motion to Dismiss. Plaintiff filed an amended complaint. (Appendix B) On January 28, 1983, the Court granted the Railroad's Motion to Transfer to the Equity Division. (Appendix D) Subsequent to the transfer to the Equity Division, the Railroad filed a Motion to Strike Plaintiff's Jury Demand on the ground that the plaintiff was not entitled to a jury in this equity action to set aside a final judgment. (Appendix E) On June 15, 1984, Judge Marvin Cherner issued a Pre-trial Order containing a well reasoned Opinion denying the Motion to Strike the Jury Demand. (Appendix F) The Railroad filed a Petition for Mandamus with the Supreme Court of Alabama. On January 4, 1985, the Alabama Supreme Court denied the Petition for Mandamus. On January 18, 1985, Petitioner filed a Petition for Rehearing, which was denied by the Alabama Supreme Court on May 10, 1985. (Appendix G&F) This brief

supplements the Alabama Supreme Court's written Opinion, the Opinion of Trial Judge Marvin Cherner, and submits supporting arguments that the Opinion of the Alabama Supreme Court was a correct application of the law.

REASONS FOR DENYING THE WRIT

Nettie Faye Duckworth Warren's action seeking to set aside a fraudulently obtained consent judgment is a FELA claim brought in state court. This case presents a conflict between state court rules and this federal statutory remedy. Alabama law provides that an action to set aside a judgment is an equitable proceeding which must be tried before a court without a jury. The federal statute under which Mrs. Warren brings her claim provides a FELA claimant the right to a jury trial on all factual issues. This Court has protected a FELA claimant's right to a jury trial from the application of local rules of procedure in its decision of *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 72 S.Ct. 312 (1952). The Alabama Supreme Court correctly interpreted *Dice* in its decision to protect Mrs. Warren's right to trial by jury on the issue of the consent judgment's validity.

1. Alabama equity law does not apply.

In *Dice*, this Court did not allow Ohio equity law to deprive a FELA claimant of his right to a jury trial on the issue of a fraudulently obtained release. Dice, while working as a railroad fireman, was seriously injured when the engine in which he was riding jumped a track. He brought suit in a FELA action and the Railroad asserted the defense that Dice had executed a release whereby he released the Railroad of all claims. Ohio laws treat an attack on a release as an equitable action, not triable by a jury. This Court concluded that in a FELA claim, the plaintiff is entitled to a jury trial on the issue of the release's validity as well as all other factual issues. This Court emphasized that the right to a jury trial is a fundamental right afforded to injured railroad employees and their surviving de-

pendents under the FELA and has long been recognized as part and parcel of the FELA remedy itself. *Dice* at 363; *Bailey v. Central Vermont Railway,* 319 U.S. 350, 63 S. Ct. 1062, 87 L.Ed. 1444 (1943).

This Court in *Dice*, recognized that:

> To deprive railroad workers of the benefit of a jury trial where there is evidence to support negligence 'is to take away a goodly portion of the relief which Congress has afforded them.' Id. at 363.

In *Bailey*, this Court stated:

> To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them. Id. at 354.

This issue was put to rest in *Dice* when this Court held:

> It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial . . . Id. at 363.

In *Dice,* this Court adheres to the principle that the right to a jury trial is part and parcel of the FELA claimant's remedy. Therefore, crucial issues arising in the course of litigation shall be tried before a jury as part of the remedy afforded by the FELA. Any procedural rule which deprives the claimant of the right shall not be applied.

This Court is emphatic in *Dice* that a state court cannot split a FELA action so that issues of fraud are decided by a judge and issues of negligence are decided by a jury. The Court commented that Ohio could eliminate the right to a jury trial in all FELA actions only by eliminating the right to a jury trial in all negligent cases arising under common law or FELA. The Court continued by stating:

> But Ohio has not done this. It has provided jury trials for cases arising under the Federal Act but seeks to single out one phase of the question of fraudulent releases for determination by a judge rather than a jury. *Dice* at 363.

This Court has emphatically stated in its decision of *Dice*, that "state laws are not controlling in determining what the incidents of this federal right shall be." Id. at 361. *Chesapeake & Ohio R. Co. v Kuhn*, 284 U.S. 44, 52 S.Ct. 45, 76 L.Ed. 157 (1931); *Ricketts v. Pennsylvania R. Co.*, 153 F.2d 757, 759 (2nd Cir. 1946). Likewise, Alabama equity law cannot be applied to deprive a FELA claimant of his federal right to a jury trial.

2. Federal law requires a jury trial in FELA cases.

Petitioner argues that neither state law nor federal common law requires a jury trial. The Railroad cites *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 332 U.S. 238 (1944) to support its argument that federal common law does not require a jury trial to set aside a fraudulent judgment. However, *Hazel-Atlas* is not relevant to the instant case because it is brought under federal patent laws, not under the FELA. This distinction is the determining factor in the *Dice* decision with which the Alabama Supreme Court complied. The crux of the *Dice* decision, is that in a *FELA* claim, the plaintiff's right to a jury trial will not be abolished by state equity practice. This Court did not allow the determination of these issues to be split between a judge and jury. Likewise, the Alabama Supreme Court will not allow the determination of a fraudulent consent judgment and other issues of negligence to be split between a judge and jury. To do so would be in direct contradiction of *Dice*.

3. This FELA action is not barred by the principles of res judicata.

Petitioner argues that the principles of res judicata are invoked by a consent judgment; therefore, plaintiff's FELA action is barred. However, Petitioner ignores an underlying principle of this doctrine. A judgment obtained by fraud or collusion may not be used as the basis for its application. The principles of res judicata may not be invoked to sustain fraud. *Riehle v. Margolies*, 279 U.S. 218, 49 S.Ct. 310, 73 L.Ed. 669

(1928). The Alabama courts have adhered to this principle and will not apply the doctrine so as to deny "justice or deprive a litigant of a righteous claim." *Krasner v. Reed*, 30 So.2d 731, 734, 33 Ala. App. 85, pet. for cert. dismissed 30 So.2d 734, 249 Ala. 240 (1947).

This consent judgment does not represent the culmination of litigation or of a lawsuit previously filed by Mrs. Warren. Mrs. Warren was told by the claim agent that $151,500.00 was the total amount that she could collect from the defendant. The claim agent then took Mrs. Warren to the office of the Burlington Northern Railroad's attorney, who then prepared a complaint to be signed by Mrs. Warren as plaintiff. After the complaint was prepared, defendant's claim agent and attorney escorted Mrs. Warren to the courthouse where the release was reduced to a consent judgment. Mrs. Warren was never informed of the Railroad's liability under the FELA or of the remedy afforded her under the FELA. This judgment is no more than a fraudulent release that the Railroad's claim agents and attorneys cleverly had reduced to a final judgment. Therefore, the judgment does not bar a subsequent FELA suit which seeks to vacate the consent procured by fraud and to provide to the plaintiff the remedy to which she is entitled under the FELA. The Railroad cannot defraud a plaintiff of her rightful claim and then hide behind res judicata to enforce the fraud.

4. Consent judgments and releases are treated identically under the FELA.

The Railroad argues that consent judgments are distinguishable from releases; therefore, *Dice* does not apply to the instant case. However, the two devices are identical in purpose and substance. Both a fraudulent release and a fraudulent consent judgment would be attacked in equitable proceedings under Alabama law in non FELA cases. Although the validity of these devices would be issues for a judge to determine under Alabama law, the validity of a release and a consent judgment are issues for a jury to determine under the principles of *Dice*.

Equity practice in Ohio was, prior to *Dice,* identical to that of Alabama. The Railroad seeks to invoke Alabama's equity practice in denying plaintiff's right to trial by jury. That is precisely what Ohio attempted to do in *Dice.* However, Alabama's equity practice is no more sacred than that of Ohio. The Alabama Supreme Court correctly followed *Dice* in its determination that Alabama's court rules may not deprive a FELA claimant of the right to a jury trial on all factual issues.

5. Title 45 U.S.C. §55 guarantees a FELA claimant a right to trial by jury in this instance.

Petitioner argues that the Alabama Supreme Court gives the FELA an unique position and that "to accord such a status to FELA cases would require at a minimum congressional intent to require juries in this setting." However, Petitioner fails to cite Title 45 U.S.C. §55. It reads in pertinent part:

> Any contract, rule, regulation, or *device whatsoever,* the purpose or intent of which is to enable any common carrier to exempt itself from liability created by this chapter shall to that extent be void . . . (Emphasis supplied).

This statute protects employees and their surviving dependents from any and all methods which a railroad might employ with the intent to escape any measure of its liability under the Act. In keeping with the congressional intent, 45 U.S.C. §55 has been relied upon to declare fraudulently obtained settlements and releases void. *Duncan v. Thompson,* 315 U.S. 1, 62 S.Ct. 422, 86 L.Ed. 575 (1942).

The scope of this statute is broad and must be read as such if the Act is to accomplish its humanitarian purpose. *Urie v. Thompson,* 337 U.S. 181, 182, 69 S.Ct. 1018, 93 L.Ed. 1282, 11 A.L.R. 2d 252 (1949). The section is not limited to fraudulently obtained statements and releases but forbids "any device whatsoever" which is intended to escape liability under the Act. This point is made clear in *Dice, supra,* in which this Court stated:

> Releases and *other devices* designed to liquidate or defeat injured employees' claims play, an important part in the

> Federal Acts Administration. Compare *Duncan v. Thompson*, 315 U.S. 1, 62 S.Ct. 422, 86 L.Ed. 575. Their validity is but one of the many interrelated questions that must constantly be determined in these cases according to a uniform federal law. 342 U.S. at 361-62 (Emphasis supplied).

Respondent submits that the use of the term "device whatsoever" and "other devices" by the United States Congress and this Court evinces congressional intention to cover *all* liability escaping measures. If Congress wished only to prohibit contractual releases, the words "device whatsoever" would be meaningless and superfluous.

It is the term "device whatsoever" that expands Title 45 U.S.C. §55's coverage beyond releases to include every measure or connivance which the Railroad might use in an attempt to escape liability. This includes the measures used by the Railroad against Nettie Faye Duckworth Warren. The scam used against Mrs. Warren was not a judgment that she obtained representing the culmination of litigation or the product of a lawsuit in which her interests were completely advocated. It is no more than a product of the Railroad's imagination, manipulation, misrepresentations and fraud and therefore a "device" prohibited by Title 45 U.S.C. §55. As has been briefed fully heretofore, a FELA plaintiff is entitled to a jury trial on the issue of whether Title 45 U.S.C. §55 was violated by the Railroad's use of such a "device". *Dice, supra.*

The argument of the Railroad in this case totally ignores the congressional intent shown in §55 and supplants that intent with a theoretical and erroneous argument that would allow railroads to settle every FELA claim by consent judgment and thereby totally avoid the intent of Congress in enacting §55 and totally avoid the rationale of the Supreme Court of the United States' opinion in *Bailey v. Central Vermont Railroad*, 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444 (1943), *Dice, supra,* and other cases stating that the right to a jury trial is part and parcel of the FELA law. *Dice* says this includes Title 45 U.S.C. §55.

If *Dice, Bailey,* and §55 are not enforced by this Court, every

release of a future FELA claim will be by consent judgment and there will be no such thing as a jury trial to determine whether or not the consent judgment in question was a "device . . . the purpose or intent of which" was to enable a railroad to exempt itself from any liability created by the FELA. Uniformity of application of FELA law by the various state courts would crumble and the rationale of §55 and *Dice,* as well as *Brown v. Western Railway of Alabama,* 338 U.S. 294, 70 S.Ct. 105, 94 L.Ed. 100 (1949) would be ignored.

CONCLUSION

This Court has consistently protected the FELA claimant's right to a trial by jury. *Bailey* at 354; *Brown* at 294; *Dice* at 359. The decision of the Alabama Supreme Court is consistent with the precedent set in the cases cited above. A jury trial is a substantive right of the FELA claimant. The Alabama Supreme Court was correct in its analysis of *Dice.* A fraudulent release and a fraudulent consent judgment would be attacked in equity proceedings under Alabama law in a non FELA context. *Dice* requires a jury trial for an attack on a release in a FELA case, therefore, a jury trial is required for an attack on a consent judgment in a FELA case. The Alabama Supreme Court correctly concluded that to deny this basic right of trial by jury violated the dictates of the United States Supreme Court.

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Hon. Marvin Cherner, Judge
of the Tenth Judicial
Circuit of Alabama

APPENDICES

APPENDIX A

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

NETTIE FAYE DUCKWORTH WARREN, Administratrix of the Estate of JAMES B. DUCKWORTH, who sues on her behalf as totally dependent surviving widow and on behalf of Anita Duckworth, James Randy Duckworth, Bobby Duckworth, and Danny Duckworth, the totally dependent minor children of JAMES B. DUCKWORTH, Deceased, Plaintiff,	)	
v.	)	CIVIL ACTION NO. CV81-4859
ST. LOUIS — SAN FRANCISCO RAILWAY COMPANY, a corporation, BURLINGTON NORTHERN RAILWAY COMPANY, a corporation, and KERSHAW MANUFACTURING COMPANY, INC., a corporation, Defendants.	)	

SUMMONS

To Any Sheriff in the State of Alabama:

You are hereby commanded to serve this summons and a copy of the complaint in this action upon defendants St. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, BURLINGTON NORTHERN RAILWAY COMPANY, a corporation, and KERSHAW MANUFACTURING COMPANY, INC., a corporation.

Each defendant is required to serve a written answer to the complaint upon Scott A. Powell, attorney of record for the plaintiff, whose address is 1620 First Alabama Bank Building, Birmingham, Alabama 35203-3269, within thirty (30) days after service of this summons with the exclusion of the day of service, and to file the original of the said written answer with the clerk of the court within the said thirty day period. If any defendant fails to do so, a judgment by default may be entered against that defendant for the relief claimed in the complaint.

DATED: November 12, 1981

/s/ POLLY CONRADI

Clerk of the Court

COMPLAINT

1. The plaintiff is the totally dependant surviving widow of JAMES B. DUCKWORTH, deceased, and sues in her capacity as administratrix of the estate of JAMES B. DUCKWORTH, deceased and for her benefit as said totally dependent surviving widow. Plaintiff also sues for the benefit of Anita Duckworth, a minor sixteen (16) years of age, Randy Duckworth, a minor twelve (12) years of age, Bobby Duckworth, a minor ten (10) years of age, and Danny Duckworth, a minor four (4) years of age, who are the totally dependant surviving minor children of JAMES B. DUCKWORTH, deceased.

2. At all times referred to herein the plaintiff was an employee of the defendant and was working within the line and scope of his employment for the defendant. At all times referred to herein the defendant was a common carrier by railroad engaged in the business of operating a railroad in interstate commerce for hire for the purpose of carrying freight and passengers in interstate commerce. At all times referred to herein the plaintiff's duties of employment for the defendant were in the furtherance of such interstate

commerce or directly or closely and substantially affected such interstate commerce. This action is brought under and by virtue of the provisions of the Federal Employers Liability Act, Tit. 45, U.S.C.A., § 51, et seq.

3. Plaintiff avers that heretofore, on to-wit, the 21st day of December, 1978, JAMES B. DUCKWORTH, deceased, was working as a laborer for the defendant, BURLINGTON NORTHERN RAILWAY COMPANY, successor corporation of ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, at or near Tupelo, Mississippi, when a bush hog operating nearby on the tracks and roadbed of the defendant, caused a wire to be thrown out of the unguarded portion of the blade, striking JAMES B. DUCKWORTH in the throat with such force that he was so severely injured that on, to-wit, the 26th day of December, 1978, he died.

4. Plaintiff avers that JAMES B. DUCKWORTH, deceased, was killed as a proximate result, in whole or in part, of the negligence of the defendant, BURLINGTON NORTHERN RAILWAY COMPANY, the successor corporation of ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, its agents, servants or employees, while acting within the line of scope of their employment for the defendant or by reason of a defect or insufficiency due to its negligence in its roadbed, tracks, bush hogs, safety practice, work practices, guards, guards on bush hogs, absence of guards on bush hogs, absence of warning signs on bush hogs warning JAMES B. DUCKWORTH of the inherent danger attendant with the operation of said bush hog.

5. Plaintiff further avers that the death of JAMES B. DUCKWORTH was proximately caused, in whole or in part, by the negligent failure of the defendant, BURLINGTON NORTHERN RAILWAY COMPANY, a corporation, to use reasonable care to provide to JAMES B. DUCKWORTH, a reasonably safe place for him to do his work and labor for the defendant on the occasion of sustaining the injuries which resulted in his death.

6. Plaintiff further avers that the death of JAMES B. DUCKWORTH, was proximately caused, in whole or in part, by the negligent failure of the defendant, BURLINGTON NORTHERN RAILWAY COMPANY, to provide guards on its bush hog machines when they knew or in the exercise of reasonable care should have known that said machine created an ultar-hazardous work situation and work station for the deceased, James B. DUCKWORTH, but negligently failed to provide a guard around the machine proximately resulting in JAMES B. DUCKWORTH'S death.

7. Plaintiff further avers that heretofore, prior to December 21, 1978, the defendant, the KERSHAW MANUFACTURING COMPANY, INC., a corporation, manufactured this bush hog and plaintiff avers that the said defendant negligently breached the extended manufacture's liability doctrine of the State of Alabama and that the bush hog was not safely guarded and that said bush hog was negligently designed and negligently manufactured without said guarding attachment. Plaintiff further avers that bush hog was negligently manufactured and negligently sold to the defendant, BURLINGTON NORTHERN RAILWAY COMPANY, a corporation.

8. Plaintiff avers that as a proximate consequence of the said negligent breach of the extended manufacture's liability doctrine of the State of Alabama, the said defendant, KERSHAW MANUFACTURING COMPANY, INC., a corporation, directly and proximately contributed to the death of her said husband as aforesaid.

9. Plaintiff further avers that her said husband's death was proximately caused by the combined and concurring negligence of all defendants at the aforesaid time and place in the negligent manner as heretofore stated in this complaint as to all defendants.

10. Plaintiff further avers that heretofore, on to-wit, the 2nd day of January, 1980, a judgment was entered in the case of NETTIE FAYE DUCKWORTH, v. ST. LOUIS -

SAN FRANCISCO RAILWAY COMPANY and KERSHAW MANUFACTURING COMPANY in the amount of one hundred fifty-one thousand five hundred dollars ($151,500). Plaintiff further avers that said judgment is null and void in that said judgment was procured by fraud on the part of the defendants, its agents, servants or employees while acting within the line of scope of their employment for the defendants. Plaintiff further avers that said judgment is null and void and that said judgment does not provide any allocation or distribution for the deceased minor children pursuant to Federal statutes.

11. As damages, plaintiff claims of the defendants the sum of five million dollars ($5,000,000.00) for the benefit of herself as the surviving dependant widow of JAMES B. DUCKWORTH, deceased, and for the benefit of her four minor children as totally dependant surviving children of JAMES B. DUCKWORTH, deceased.

12. Plaintiff demands trial by struck jury.

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BY: /s/ SCOTT A. POWELL
SCOTT A. POWELL

TRIAL COUNSEL: Frank O. Burge, Jr.
Scott A Powell

PLAINTIFF'S ADDRESS:
Route 1
Guin, Alabama 35563

DEFENDANT'S ADDRESS:

BURLINGTON NORTHERN, INC.
Vastine Stabler, Jr.
1900 First National-Southern Natural Bldg.
Birmingham, Alabama 35203-3269

KERSHAW MANUFACTURING COMPANY
Donald C. Bailey
2205 West Fairview Avenue
Montgomery, Alabama 36108

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY
30 South 18th Street
Birmingham, Alabama 35233

APPENDIX B

IN THE CIRCUIT COURT FOR THE TENTH JUDICIAL CIRCUIT OF ALABAMA.

NETTIE FAYE DUCKWORTH WARREN, etc.,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO. CV-81-4859
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, et al.,	)	
Defendants.	)	

PLAINTIFF'S FIRST AMENDMENT TO COMPLAINT

Plaintiff amends her complaint heretofore filed as follows:

1. By adding the following averment to paragraph 10 of plaintiff's complaint:

Plaintiff avers that the aforesaid fraud of the defendant was perpetrated upon the plaintiff by the defendants' claim agent who made misrepresentations which were relied on as being true by the plaintiff but which in fact were untrue as a result of which plaintiff was damaged.

The said claim agent represented to the plaintiff that plaintiff did not need a lawyer to explain to her her rights or to handle her claim for her because he, the claim agent of the St. Louis-San Francisco Railway Company, would handle everything for her and for her children with the St. Louis-San Francisco Railway Company. The said representation was untrue in that the said claim agent never explained to the plaintiff her rights against the St. Louis-San Francisco Railway Company or against Kershaw Manufacturing Company; he never explained to the plaintiff the Federal Employers Liability Act and in fact never mentioned

the Federal Employers Liability Act to the plaintiff; the said claim agent never mentioned to the plaintiff that loss of contributions from her deceased husband was an item of damage under the Federal Employers Liability Act; the said claim agent never mentioned to the plaintiff that loss of parental guidance of plaintiff's children was an item of damage under the Federal Employers Liability Act; the said claim agent never mentioned to the plaintiff that conscious pain and suffering of her deceased husband during his life time subsequent to his injury and prior to his death was an item of damage under the Federal Employers Liability Act; that Kershaw Manufacturing Company was subject to the Manufacturer's Liability Doctrine of the State of Mississippi; the law of damages as it applied to Kershaw Manufacturing Company and plaintiff and her children was never mentioned to the plaintiff by the said claim agent; the said claim agent never mentioned to the plaintiff that there must be an allocation of total damages between plaintiff as the surviving dependent widow and her children as the surviving dependent children of the deceased husband and father; the said claim agent never told the plaintiff what any investigation disclosed as to the cause of her husband's injury and the negligence of the railroad and the negligence of Kershaw Manufacturing Company except to tell the plaintiff that the accident was caused by her husband's own fault.

The said claim agent represented to the plaintiff that he would work in her best interest and in the best interest of her children in handling her claim against the railroad company if she would not get a lawyer. The said claim agent did not work in the best interest of the plaintiff and her children in that he had her settle the case for One Hundred Fifty One Thousand Five Hundred Dollars ($151,500.00) which was substantially less than plaintiff and her children were entitled under the existing law and facts of the case; the said claim agent had a conflict of interest between representing the plaintiff as he told plaintiff he would do at a time when he was working for the defendant St. Louis-San Francisco

Railway Company and the defendant Kershaw Manufacturing Company; the said claim agent used the first person plural "we" when discussing his efforts on behalf of plaintiff and her children against the railroad company; the said claim agent used the third person "they" and "them" when referring to his employer the St. Louis-San Francisco Railway Company; the said claim agent never explained and working as a claim agent for the defendant St. Louis-San Francisco Railway Company and Kershaw Manufacturing Company; when plaintiff protested that One Hundred Fifty Thousand Five Hundred Dollars $151,500.00) was not a sufficient amount of money for her loss the said claim agent said that was all "we" can get and "they" will not pay any more referring to himself and the plaintiff as "we" and referring to the St. Louis-San Francisco Railway Company as "they".

Plaintiff did not understand the papers that were signed at the company's lawyer's office which led to a judgment being taken but signed the documents and allowed the judgment to be taken because the said railroad claim agent told her she was getting all that she was entitled to get and that he had worked it out for her in the best interest of her and her children and he was handling everything for her so she would not have to have a lawyer and pay a lawyer.

No allocation was ever made for plaintiff's minor children who were totally dependent upon their deceased father James B. Duckworth for support during the life time of the said James B. Duckworth.

Plaintiff avers that the aforesaid misrepresentations of material facts were relied on by the plaintiff in her dealings with the said railroad claim agent to her detriment and damage and were material misrepresentations which misled her to her detriment.

BURGE & FLORIE, P.C.
1620 First Alabama Bank Building
Birmingham, Alabama 35203-3269
(205) 251-9729

By: /s/ FRANK O. BURGE, JR.
Frank O. Burge, Jr.

CERTIFICATE OF SERVICE

I do hereby certify that I have on this the 25th day of May, 1982, served a copy of the foregoing pleading on counsel for all parties concerned by hand delivery.

/s/ FRANK O. BURGE, JR.
Frank O. Burge, Jr.

APPENDIX C

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

NETTIE FAYE DUCKWORTH WARREN, Administratrix of the Estate of JAMES B. DUCKWORTH, who sues on her behalf as totally dependent surviving widow and on behalf of Anita Duckworth, James Randy Duckworth, Bobby Duckworth, and Danny Duckworth, the totally dependent minor children of JAMES B. DUCKWORTH, deceased,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO. CV-81-4859
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, BURLINGTON NORTHERN RAILWAY COMPANY, a corporation, and KERSHAW MANUFACTURING COMPANY, INC., a corporation,	)	
Defendants.	)	

MOTION TO DISMISS OR IN THE ALTERNATIVE TO TRANSFER TO EQUITY DIVISION

Comes now the defendant, Burlington Northern Railway Company, a corporation, which is the successor corporation to St. Louis-San Francisco Railway Company and moves this Court to dismiss this action. In support of this motion, defendant says as follows:

1. The complaint fails to state a claim upon which relief can be granted.

2. The basis for setting aside the earlier judgment rendered between these parties is alleged to be "fraud" by the defendants, but the plaintiff fails to state with particularity the circumstances constituting fraud as required by Rule 9(b), Ala. R. Civ. P.

In the alternative, the defendant moves this Court to transfer this action to equity division. In support of this motion, defendant says as follows:

1. Plaintiff in this cause of action filed suit against the defendants in this cause of action in the Circuit Court of Walker County, Alabama.

2. An order was issued on January 2, 1980 by the Circuit Court of Walker County approving settlement of the case and entering judgment against St. Louis-San Francisco Railway Company in the sum of $111,500.00 and against Kershaw Manufacturing Company, Inc. in the amount of $40,000.00. Said judgment is attached hereto as Exhibit A.

3. The total amount of the judgment ($151,500.00) has been paid by the defendants to the plaintiff.

4. Plaintiff now seeks in this independent action to set aside the judgment over one and one-half years ago by another court.

5. An independent action filed to set aside an earlier judgment under Rule 64, Ala. R. Civ. P., is an equity action. *Denton v. Stanford*, 383 So. 2d 847, 848 (Ala. Civ. App. 1980) (holding that "This is an independent action in equity for relief from a judgment"); *Battle v. Morris*, 265 Ala. 851 (1957) (original bill filed in equity to set aside a consent judgment rendered in favor of plaintiff on the law side of the circuit court); *Bankers Mortgage Company v. United States*, 423 F.2d 73, 78 (5th Cir. 1970) *cert. denied* 399 U.S. 927 (1970) (holding that " 'independent action' as used in [Rule 60(b)] was meant to refer to a procedure which has been historically known simply as an *independent action in equity* to obtain relief from a judgment"); 7 J. Moore,

Moore's Federal Practice ¶ 60.36 ("The original bill or independent action, to impeach for *fraud* . . . is founded upon an independent and substantive *equitable* jurisdiction"). Therefore, the Equity Division has exclusive jurisdiction over plaintiff's cause of action and any further proceedings should be conducted in that forum.

/s/ LEE E. BAINS, JR.

/s/ L. VASTINE STABLER, JR.

Attorneys for Defendant,
Burlington Northern Railroad
Company, a corporation

OF COUNSEL:

CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL
1900 First National-Southern
Natural Building
Birmingham, Alabama 35203
(205) 252-8800

NOTICE OF HEARING

PLEASE TAKE NOTICE that hearing on the above and foregoing motion will be had before the Presiding Judge of this Honorable Court on Wednesday, January 13, 1982 at 10:00 a.m. *ORAL ARGUMENT REQUESTED.*

/s/ L. VASTINE STABLER, JR.

OF COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing motion to dismiss or in the alternative to transfer to equity division has been duly served upon counsel for plaintiff by mailing same to Mr. Scott Powell, 1620 First Alabama Bank Building, Birmingham, Alabama 35203, this the 21st day of December, 1981.

/s/ L. VASTINE STABLER, JR.
OF COUNSEL

TRIAL COUNSEL:

L. Vastine Stabler, Jr.
Michael C. Quillen
Lee E. Bains, Jr.

APPENDIX D

JOHN N. BRYAN, JR.
Circuit Judge
Tenth Judicial Circuit
of Alabama
303 County Courthouse
Birmingham, Alabama 35203
January 28, 1983

Mr. Frank O. Burge, Jr.
Attorney at Law
1620 First Alabama Bank Bldg.
Birmingham, Alabama 35203

Mr. L. Vastine Stabler, Jr.
Cabaniss, Johnston, Gardner,
Dumas & O'Neal
1900 First National-Southern
Natural Bldg.
Birmingham, Alabama 35203

Mr. Jack J. Hall
Suite 725
First Alabama Bank Building
Birmingham, Alabama 35203

Re: Case No. CV 8104859
Nettie Faye Duckworth Warren
vs
St. Louis-San Francisco Railway
Co., et al

Gentlemen:

The Court this date entered the following order on the motion to transfer to equity division:

"January 28, 1983. On October 14, 1983, this court heard the routine motion docket. The motions to transfer this

case to the equity division were heard by this court. The plaintiffs' attorney and the defendants' attorneys briefly argued the points and each was granted two weeks in which to submit briefs in support of and in opposition to said transfer of equity. To date, the court has received no further briefs in opposition to the transfer, therefore, the court directs that this case be transferred to the equity division of this court. This order of transfer is without prejudice to the equity judge assigned this particular case. In the event said judge is satisfied that this case is inappropriate for equitable relief, then said judge may transfer the case back to the law side."

Yours truly,

/s/ JOHN N. BRYAN, JR.

Presiding Judge

APPENDIX E

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
(EQUITY DIVISION)

NETTIE FAYE DUCKWORTH WARREN, Administratrix of the Estate of JAMES B. DUCKWORTH, who sues on her behalf as totally dependent surviving widow and on behalf of Anita Duckworth, James Randy Duckworth, Bobby Duckworth, and Danny Duckworth, the totally dependent minor children of JAMES B. DUCKWORTH, deceased, Plaintiff,	)	CIVIL ACTION NO. CV-83-500-457-WAT
vs.	)	
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY a corporation; BURLINGTON NORTHERN RAILROAD COMPANY, a corporation; and KERSHAW MANUFACTURING COMPANY, INC. a corporation, Defendants.	)	

MOTION TO STRIKE

Comes now the defendant, Burlington Northern Railroad Company, a corporation, which is the successor corporation to St. Louis-San Francisco Railway Company, and moves this Court to strike plaintiff's jury demand. In support of this motion, defendant says as follows:

1. Plaintiff seeks in this independent action to set aside

the judgment rendered for plaintiff and against defendants over three years ago by Circuit Court of Walker County.

2. An independent action filed to set aside an earlier judgment under Rule 64, Ala. R. Civ. P., is an equity action. *Denton v. Stanford*, 383 So. 2d 847 (Ala. Civ App. 1980) (holding that "This is an independent action in equity for relief from a judgment"); *Battle v. Morris*, 265 Ala. 851 (1957) (original bill filed in equity to set aside a consent judgment entered in favor of plaintiff on the law side of the circuit court); *Bankers Mortgage Company v. United States*, 423, F.2d 73, 78 (5th Cir. 1970), *cert. denied*, 399 U.S. 927 (1970) (holding that " 'independent action' as used in [Rule 60(b)] was meant to refer to procedure which has been historically known simply as an *independent action in equity* to obtain relief from a judgment"); 7 J. Moore, *Moore's Federal Practice* ¶ 60.36 ("The original bill of independent action, to impeach for *fraud* . . . is founded upon an independent and substantive *equitable* jurisdiction").

3. This independent action was brought on the law side of the Jefferson County Circuit Court. On January 28, 1983, Judge Bryan granted defendants' motion to transfer this case to the equity division.

4. Plaintiff is not entitled to a jury in this equity action to set aside a final judgment.

/s/ L. VASTINE STABLER, JR.

/s/ LEE E. BAINS, JR.

Attorneys for Defendant,
Burlington Northern Railroad
Company, a corporation

OF COUNSEL:
CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL
1900 First National-Southern
Natural Building
Birmingham, Alabama 35203
(205) 252-8800

NOTICE OF HEARING

PLEASE TAKE NOTICE that a hearing on the above and foregoing Motion to Strike will be had before the Honorable William A. Thompson on Wednesday, September 21, 1983 at 8:30 a.m.

/s/ LEE E. BAINS, JR.
OF COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion to Strike has been duly served upon all counsel by hand-delivering same to Mr. Scott Powell, 1620 First Alabama Bank Building, Birmingham, Alabama 35203, and to Mr. Doug Martin, 725 First Alabama Bank Building, Birmingham, Alabama 35203, this the 9th day of September, 1983.

/s/ LEE E. BAINS, JR.
OF COUNSEL

APPENDIX F

IN THE CIRCUIT COURT FOR THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

NETTIE FAYE DUCKWORTH WARREN, as Administratrix of the Estate of James B. Duckworth, who sues on her own behalf as the dependent surviving widow of James B. Duckworth and who also sues on behalf of Anita Duckworth, James Randy Duckworth, Bobby Duckworth and Danny Duckworth, the dependent minor children of James B. Duckworth, deceased, Plaintiff,	)	
v.	)	Civil Action No. CV-81-4859
BURLINGTON NORTHERN RAILROAD COMPANY, a corporation (successor corporation to St. LOUIS, San Francisco Railway Company, a corporation; and KERSHAW MANUFACTURING COMPANY, INC., a corporation, Defendants.	)	

PRE-TRIAL ORDER

1. *Counsel.* Counsel for the plaintiff, Nettie Faye Duckworth Warren, are Frank O. Burge and Scott A. Powell. Counsel for the defendant, Burlington Northern Railway Company (successor to St. Louis-San Francisco Railway Company), is Vastine Stabler. Counsel for the defendant, Kershaw Manufacturing Company, Inc., a corporation, is Jack J. Hall.

2. *Duties.* Plaintiff is Nettie Faye Duckworth Warren who sues on her own behalf as the dependent surviving widow of James B. Duckworth, deceased, and who also sues on behalf of Anita Duckworth, James Randy Duckworth, Bobby Duckworth and Danny Duckworth, as the dependent minor children of James B. Duckworth, deceased. (For convenience, this plaintiff will be referred to as "Nettie Faye Warren" or "Warren"). Defendants are Burlington Northern Railway Company, a corporation ("Burlington"), and Kershaw Manufacturing Company, Inc., a corporation ("Kershaw").

3. *Pleadings.* The following pleadings have been allowed:

A. Complaint and amended complaint on behalf of Nettie Faye Warren.

B. Answer and amended answer by Kershaw. Burlington has not filed an answer and is hereby directed to file an answer in accordance with the provisions of Rule 8(b) of the Alabama Rules of Civil Procedure within twenty days from the date of this order.

4. *Prior Motions.* The following motions were heard and disposed of as hereinafter indicated:

A. Motion by Burlington to transfer to the Equity Division was granted.

B. Motion by Kershaw to transfer to the Equity Division was granted.

By order entered October 28, 1983, this case was remanded and re-transfered to the Civil Division for further proceedings and specially assigned to this Court.

5. *Pending Motions.* The following motions are now pending and the following action is taken with respect to such motions:

A. Motion by Burlington to dismiss.

In support of its motion, Burlington has submitted a copy of a final judgment rendered in the Circuit Court of Walker County, Alabama, CA # CV-80-02 on January 1, 1980 awarding Nettie Faye Warren the sum of $111,500 against Burlington and the sum of $40,000 against Kershaw.

In the first amendment to her complaint, Nettie Faye Warren asserts that she was induced to agree to the judgment entered in her favor from the Circuit Court of Walker County, Alabama by representations made to her by the defendants upon which she relied to her detriment and that the representations were false. Nettie Faye Warren therefore seeks to vacate and set aside the judgment as being obtained as result of the frauds practiced on her by Burlington.

Since Nettie Faye Warren has challenged the judgment by the allegations of her complaint, the complaint may not be dismissed. Accordingly, the motion to dismiss filed by Burlington is hereby overruled.

B. Motions by Burlington and Kershaw to strike jury demand.

In the first amendment to her complaint, Nettie Faye Warren alleges that the judgment rendered in her favor and against Burlington and Kershaw by the Circuit Court of Walker County, Alabama in Civil Action CV-80-02, was obtained by fraud. She seeks now in an independent action in this Court to set aside the judgment. Rule 60(b) of the Alabama Rules of Civil Procedure provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceedings for the following reasons: . . . (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . this rule does not limit the power of a court to entertain an independent action within a reasonable time and not to exceed three years after the entry of the judgment . . . to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. . .

In Alabama, an independent action brought to set aside or vacate a judgment procurred by fraud, accident or mistake, is in the nature of an equitable remedy. In *Maddox v. Hunt*, 281 Ala. 335, 202 So.2d 543 (1967), an independent

action had been brought by the plaintiff seeking to set aside a judgment obtained by default. Speaking to the general principles involved and to the nature of the remedy, the Supreme Court of Alabama stated in its opinion the following:

> Courts of equity will set aside and vacate judgments procurred by fraud, accident, or mistake, and without negligence on the part of the complainant, if the complainant has a meritorious defense. *Barrow v. Lindsey*, 230 Ala. 45, 159 So. 232; *St. John v. Campbell*, 250 Ala. 380, 34 So.2d 584.
>
> However, as stated in *Hendley v. Chabert*, et al., 189 Ala. 258, 65 So. 993, this equitable power to set aside a judgment of another court is of great strictness, otherwise equity courts would supplant the jurisdiction of all other courts. A due regard for the interests and caution in the exercise of the power of equity to set aside judgments.

Where the plaintiff's claim is equitable in nature, there is no right to a jury trial. It is true that Rule 38(a) of the Alabama Rules of Civil Procedure states that the right of trial by jury is declared by the Constitution of Alabama shall be preserved to the parties inviolate. However, this rule only means that the right to jury trial is preserved as it was known in Alabama before the adoption of the Alabama Rules of Civil Procedure. The Committee Comments to Rule 38(a) make this clear:

> Subdivision (a) is identical with Constitution 1901, ¶ 11, and thus preserves the right to jury trial precisely as it has been known heretofore in Alabama. See generally, Jones, Trial by Jury in Alabama, 8 Ala. L. Rev. 274 (1956). Because law and equity are now to be merged, there will be cases in which issues to be tried to the jury are combined with issues to be tried to the court. But the basic test is clear: If an issue is of a sort which heretofore would have been tried to a jury, then the party has a Constitutional right, expressly reaffirmed by Rule 38(a), to have it tried to a jury under the merged procedure. . .

The Supreme Court of Alabama has continued to construe Rule 38(a) as only giving the right to jury trial in those cases where such right existed prior to the adoption of the Alabama Rules of Civil Procedure. For example, actions seeking the cancellation or reformation of a written instrument are considered to be equitable in nature so that the parties are not entitled to a jury trial. See, e.g., *Richey v. Creel,* 437 So.2d 554 (Ala. 1983); *Johnson v. Brown,* 437 So.2d 1273 (Ala. 1983); *Holloway v. Nationwide Mut. Ins. Co.,* 376 So.2d 690 (Ala. 1979).

If Nettie Faye Warren's action seeking to set aside the judgment previously entered by the Circuit Court of Walker County involved state law, she would not be entitled to a jury trial. However, her claim is brought under the Federal Employer's Liability Act (F.E.L.A.) and her action is therefore governed by federal law rather than state law. *New York Central, etc. R. Company v. Tonsellito,* 244 U.S. 360 (1917).

In support of their motions to strike the jury demand made by Nettie Faye Warren, Burlington and Kershaw argue that federal law is applicable only to substantive legal issues involving Nettie Faye Warren's rights under F.E.L.A. and that all procedural issues are still governed by state law.

It is true that appellate courts in a number of decisions have made the differentiation between substantive and procedural issues and have applied state law to decide the latter. The difficulty however, is in trying to determine when a particular issue involves procedural law rather than substantive law. See, *Ely, The Irrepressible Myth of Erie,* 87 Harvard L. Rev. 693 (1974); *Chayes and Ely, Some Further Last Dords on Erie, The Bead Game, The Necklace,* 87 Harvard L. Rev. 741 (1974).

In *Hanna v. Plumer,* 380 U. S. 460 (1965), the U. S. Supreme Court held that the mode of obtaining service of process by a plaintiff filing a suit in federal court was governed by the Federal Rules of Civil Procedure and not by state law governing service of process. In that case, Massa-

chusetts required the complaint to be served in person on the executor of an estate while Rule 4(d)(1) of the Federal Rules of Civil Procedure permitted service by leaving a copy with an individual at the defendant's usual place of abode. The Supreme Court determined that method of service involved procedural law rather than substantive law so that service of process would be governed by the federal rules.

In *Sibbach v. Wilson & Company*, 312 U. S. 1 (1941), Mrs. Sibbach, a plaintiff, refused to submit to physical examination for purposes of discovery by the defendant although ordered to do so by the federal court. She lived in Illinois. Under Illinois law, a defendant was not able to obtain an order requiring a plaintiff to submit to physical examination. The U. S. Supreme Court rejected Mrs. Sibbach's contention on appeal that the issue whether she was required to submit to physical examination involved substantive rights and should therefore be governed by Illinois law. The U. S. Supreme Court stated:

> . . .The suggestion that the rule offends the important right to freedom from invasion of the person ignores the fact that as we hold, no invasion of freedom from personal restraint attaches to refusal so to comply with this provision. If we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded. The test must be whether a rule really regulates procedure, — the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. That the rules in question are such is admitted.

In *Minneapolis and St. Louis Railroad Company v. Bombolis*, 241 U. S. 211 (1916), the railroad on appeal raised questions concerning the manner in which the plaintiff obtained a verdict in the state court in Minnesota. By the Constitution and laws of Minnesota in civil cases, after a case has been under submission to the jury for a period of twelve hours without a unanimous verdict, five-sixths of the

jury are authorized to reach a verdict which is entitled to the legal effect of a unanimous verdict at common law.

Upholding the procedure followed by the Minnesota state court in reaching a verdict, the U. S. Supreme Court rejected the railroad's contention that the state court in enforcing a federal right under F.E.L.A. was required to comply with the 7th Amendment to the U. S. Constitution and require the jury to reach a unanimous verdict. The Supreme Court concluded that in thisinstance, the Minnesota state court could properly follow its own procedure in reaching a jury verdict.

However, in *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U. S. 359 (1952), the U. S. Supreme Court took what appears to be a directly contrary view to its position in *Bombolis*. Dice, a railroad fireman, was seriously injured when an engine in which he was riding jumped a track. When he filed suit in the Ohio state court, the railroad asserted as an additional defense that Dice had executed a release whereby he released the railroad from all claims for the sum of $924.63.

Following a trial before a jury, a verdict and judgment was rendered in favor of Dice. The trial court then granted judgment notwithstanding the verdict. This judgment was reversed by the Ohio Court of Appeals but the Ohio Supreme Court reversed the Ohio Court of Appeals and sustained the trial court's action. The Supreme Court of Ohio concluded that the issue whether there was fraud in the execution of the release was equitable in nature and therefore was properly decided by the judge rather than by the jury.

On appeal to the U. S. Supreme Court, the decision of the Supreme Court of Ohio was reversed. The U. S. Supreme Court concluded that Dice, in asserting his F.E.L.A. claim, was entitled to a jury trial on the issue whether the release was obtained from him by fraud as well as the other issues. The U. S. Supreme Court stated:

> We have previously held that 'the right to trial by jury is "a basic and fundamental feature of our system of federal jurisprudence" ' and that is 'part and parcel of

> the remedy afforded railroad workers under the Employer's Liability Act.' *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 354, 63 S. Ct. 1062, 1064, 87 L.Ed. 1444. We also recognized in that case that to deprive railroad workers of the benefit of a jury trial where there is evidence to support negligence 'is to take away a goodly portion of the relief which Congress has afforded them.' It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used. *Brown v. Western R. Co.* 338 U. S. 294, 70 S. Ct. 105, 94 L.Ed. 100.

The dissenting opinion in *Dice* pointed out that Ohio was merely following the general rule that actions which are equitable in nature do not carry with them the right to jury trial. In Ohio, as in Alabama, an action seeking to cancel or reform a written instrument obtained by fraud is equitable in nature and does not carry with it the right to a jury trial.

The majority opinion, however, concluded that the right to jury trial was a substantive right and therefore governed by federal law in claims asserted under F.E.L.A.

In the present case, Burlington and Kershaw argue that *Dice* is not applicable because that case involved the cancellation of a release obtained by fraud while Nettie Faye Warren in the present case seeks to vacate a consent judgment as being obtained by fraud. In the letter brief filed by counsel for Burlington the following statement is found:

> The conclusion of the majority in *Dice* that a jury trial is to be protected is in the context where access to the courts has not been obtained. In that sense the release agreement is a self-help mechanism. Unlike the release situation, the plaintiff in this case has availed herself of the courts. The fact that she elected to effect a consent judgment and not to invoke a jury does not mean that a right has been denied. By coming to the court, the plaintiff has invoked certain other protections available. She has received the benefit of judicial approval. . .

The consent judgment entered by the Circuit Court of Walker County, Alabama did not represent the culmination of litigation or of a lawsuit previously filed by Nettie Faye Warren. According to the testimony of Nettie Faye Warren and also of the Burlington employee, William E. Bird, she was told that $150,000 was all she would get and she agreed to accept that amount plus the $1,500 advance in settlement of her claims. Nettie Faye then went to the office of the Burlington attorney with William Bird. Burlington's attorney prepared the complaint to be signed by Nettie Faye Warren and explained to her that Burlington and Kershaw were accepting service of the same. Nettie Faye then went to the judge's chambers accompanied by Burlington's attorney and William Bird.

According to Bird's testimony, the proceedings before the Circuit Judge involved the following:

> He asked her, I think the first question he asked Mrs. Duckworth was how much education she had; and she told him. He asked her if she had talked to an attorney, and she told him that no, she had not.
>
> He asked her if she had discussed it with members of her family. She said, 'yes.' He asked her if she understood that in signing this, if she was aware that this was a full and final settlement for any and all claims related to that; and she said, 'yes,' she did. He asked her if she was satisfied with that, and she said that she was. That was basically the conversation that took place.

It is true that a final judgment rendered by a court of competent jurisdiction stands on a different footing than a release. This is true even though the judgment is a consent judgment. *Myers v. Myers*, 266 Ky. 831, 100 S.W. 2d 693 (1936); *Marietta Chair Co. v. Henderson*, 49 S.E. 312 (Ga. 1904); *Sawyer v. Smith*, 552 S.W. 2d 936 (Ct. of Civ. App. of Tex. 1977); *Irvine Toll Bridge Co. v. Williams*, 3 S.W. 2d 193 (Ky. Ct. of App 1928); *Wood Brothers Construction Co. v. Yankton County*, 54 F.2d 304 (8th Cir. 1931).

In *Marietta Chair Co. v. Henderson*, supra, the Supreme Court of Georgia stated:

> . . .Parties are, of course, bound by judgments rendered by courts of competent jurisdiction to which they have submitted their controversies, and the judgments bind them whether they expressly agree to them or not, and an express agreement that a particular judgment should be rendered gives to that judgment no peculiar character, and renders it no more sacred that the ordinary judgment. While a judgment is a contract of record, the agreement which the law implies from such a contract is simply that the parties will stand to and abide what has been decreed in the case upon the law and the facts then involved, or which could have been properly involved. . .

Acknowledging that a judgment was entered, Nettie Faye Warren now attacks the judgment as having been obtained by fraud and seeks its cancellation. She has the right under the laws of the state of Alabama to make a direct attack upon the judgment in an independent proceedings as she has done in this case. However, because her claim is asserted under F.E.L.A., she also has the right as a claimant under F.E.L.A. to demand a jury for the trial of the issues related to the question whether the consent judgment was obtained by fraud.

In both *Dice* and the present case, the F.E.L.A. claimant has asserted a claim which is equitable in nature; in *Dice*, the plaintiff was seeking to cancel a release as having been secured by fraud. In the present case, the F.E.L.A. claimant is seeking to cancel a consent judgment as having been obtained by fraud. In both cases, the claimant would not be entitled to a jury trial under state law to decide such issues. However, under *Dice*, the F.E.L.A. claimant is guaranteed the trial by jury for such issues as a substantive right. Under *Dice*, Nettie Faye Warren is entitled to a jury trial on the issue whether the consent judgment was obtained by fraud.

In accordance with this opinion, the motions filed by

Burlington and Kershaw to strike the demand for jury are hereby overruled.

C. Motion by Kershaw to dismiss or in the alternative for summary judgment.

In support of its motion for summary judgment, Kershaw argues that the consent judgment entered by the Circuit Court of Walker County, Alabama on January 2, 1980 has the legal effect of finally resolving all claims for damages against Kershaw by the dependent widow and children of James B. Duckworth, deceased and also all claims by the estate of James B. Duckworth, deceased, against Kershaw for damages based on the accident resulting in James P. Kershaw's death.

According to Kershaw, the final judgment is valid and not subject to cancellation as to Kershaw because the undisputed evidence indicates that Kershaw did not participate in or have knowledge of any alleged fraudulent conduct on the part of Burlington's employees which is the basis for Nettie Faye Warren's attack on the judgment rendered by the Circuit Court of Walker County.

Reviewing the deposition of Nettie Faye Warren, she testified as follows concerning Kershaw:

> Q. Now, did you at any time have any dealings with any one from Kershaw Manufacturing Company?
>
> A. No, sir. You are the first person I have met or even heard of being with that company.
>
> Q. Alright. Did Mr. Bird at any time tell you that he was representing Kershaw in any capacity?
>
> A. The only thing he mentioned about Kershaw is that they made the machine.
>
> * * *
>
> Q. Did I understand you correctly when you told me that the first knowledge you had that Kershaw had contributed any monies towards the settlement was after you got home and you read it?
>
> A. I read that about money. Now, he had mentioned

Kershaw's name when we talked about the machine that my husband had got hurt on.

* * *

Q. I have just got a question or two. Mrs. Warren, you said that you believe that I am the first person that you have seen representing Kershaw?

A. Yes.

Q. And that you understand that Mr. Bird was not representing Kershaw but was representing the railroad; is that correct?

A. Yes.

Q. What is it that you allege that Kershaw did wrong to mislead you in any way?

A. I can't — okay. The $40,000, is that what ya'll paid? Yes.

Okay. The Kershaw Manufacturing Company to me was just a name that had made the machinery.

* * *

Q. (By Mr. Martin) As I understand it then, neither Kershaw nor anyone acting on Kershaw's behalf has ever made any representation whatsoever to you; is that correct?

Mr. Burge: As far as you know.

A. As far as I know.

Nettie Faye Warren acknowledged in her testimony that no representations were made to her by anyone purporting to act on behalf of Kershaw. She did not learn that Kershaw was involved in the settlement until she read the papers including the final judgment when she arrived home after the settlement had been made.

In his deposition, William E. Bird testified as follows:

Now, who did you deal with, if you dealt with anyone, that had any connection with Kershaw Manufacturing Company, I-n-c.?

A. I didn't deal with Kershaw at all.

* * *

Q. Who told you that Kershaw was going to pay $40,000 toward a settlement?

A. That came from the general claims office after Mrs. Duckworth and I arrived at an agreement, and I was told that there was a contribution from them.

Q. You had reached the agreement based on $151,000. After that is when you learned that Kershaw was making some kind of contribution?

A. Yes sir.

Q. So at the time that you made the agreement with Mrs. Duckworth Warren you did not know that Kershaw was making any contribution?

A. No sir. . .

Bird testified that he had no discussions with anyone at Kershaw concerning the settlement; that he received no instructions or directions from anyone at Kershaw regarding the settlement and that at all times he was acting strictly as a representative for Burlington. He further testified that he did not at anytime represent to Nettie Faye Warren that he was acting on behalf of Kershaw.

The settlement of Nettie Faye Warren's claims against Kershaw is treated as a separate settlement in the consent judgment which awards Nettie Faye Warren the sum of $40,000 against Kershaw.

No evidence has been presented to indicate that Kershaw itself was guilty of any fraudulent conduct or that it knowingly participated or assented to any fraudulent conduct on the part of Burlington.

In *Taxin v. Food Fair Stores, Inc.*, 287 F.2d 448 (3rd Cir. 1961), Taxin asserted claims for violation of the Anti-Trust Laws against two groups of defendants, one associated with Food Fair Stores, Inc., and the second group associated with Samuel P. Mandell Co., Inc. As one of the defenses, both groups of defendants pleaded that the Taxins had executed a general release releasing them all from all claims under the anti-trust laws. In response, the Taxins executed affidavits stating that they had been induced to execute the

release instrument by a promise made in bad faith by the Food Fair Stores, Inc. defendants that Food Fair Stores would buy $500,000 worth of fruit and produce from them annually. The affidavits and allegations filed by the Taxins attacking the release did not charge that the Mandell defendants participated in or even knew of the alleged misrepresentation.

Upholding the summary judgment granted by the trial court in favor of the Mandell defendants, the U. S. Court of Appeals for the 3rd Circuit stated:

> The exculpation of the Mandell defendants was one important basis of the District Court's conclusion that the release was valid as to these parties. In analogous circumstances the Court of Appeals for the 2nd Circuit has suggested that it would be inequitable to deny one anti-trust defendant the benefit of the settlement and release solely because of fraud, unknown to him, on the part of another defendant in connection with such settlement and release. *Martina Theatre Corp. v. Schine Chain Theatres, Inc.*, 2 Cir. 1960, 278 F.2d 798, 802. This is in accord with the rule of § 477 of the Contracts Restatement which reads as follows:
>
> 'Fraud or material representation by a third person renders a transaction voidable by a party induced thereby to enter into it if the other party thereto'
>
> (a) 'has reason to know of the fraud or misrepresentation before he has given or promised in good faith something of value in the transaction or changed his position materially by reason of the transaction, or'
>
> (b) 'is affected by the fraud or misrepresentation of the law of Agency or of Trust.'

Also see *Hoge v. Hoge*, 1 Watt. (Penn.) 163 (1832).

Kershaw has changed its position materially by reason of the release, having paid the sum of $40,000 to Nettie Faye Duckworth, as consideration for the discharge of its liability. No evidence has been presented that Kershaw participated in the negotiations with Nettie Faye Warren leading to the settlement of her claims or that Kershaw knew or had notice

of facts from which it should have known by the exercise of reasonable diligence that the settlement of Nettie Faye Warren's claim against it had been obtained by fraud.

It would be inequitable to deny Kershaw the benefit of the settlement and release solely because of fraud, unknown to it, on the part of Burlington.

Accordingly, the Motion for Summary Judgment filed by Kershaw Manufacturing Company, Inc. is hereby granted. Judgment is hereby rendered in favor of Kershaw Manufacturing Company, Inc. and against the plaintiffs.

6. *Discovery.* The parties are given leave to proceed with further discovery provided it be completed at least twenty (20) days prior to the trial.

At least twenty (20) days prior to the trial, each of the parties to this litigation shall furnish and make available to each of the other parties, for inspection and copying, all documents, bills, reports, photographs and other exhibits which each such party intends to utilize at trial. Unless otherwise specifically agreed between the parties, each shall be precluded from offering any exhibits not so provided to each of the other parties (other than purely for impeachment purposes) unless relieved by the Court for good cause shown. Upon such documents being exhibits to the parties herein or counsel for each such party, each of the parties shall be deemed to have agreed that such documents and exhibits are authentic and genuine and that any photographs included in said exhibits fairly and accurately portrays the scene therein depicted and that such photographs and copies of such documents may be utilized at trial to the same extent as the originals without accounting for such originals, unless objection is made by a party within seven (7) days after being shown such document or exhibit. In the event that any such objection shall be made, the party making the same shall also state the basis for grounds for such objection. No party may object to the authenticity or genuineness of any document or exhibit on the ground that he has no knowledge of the same unless such party has first exercised

reasonable diligence in his efforts to ascertain and verify the same. Unless a party has given notice to the contrary within seven (7) days after having been shown the same, each party shall also be deemed to have agreed for purposes of this action that any bills for services or materials are reasonable in amount for the services or materials therein billed.

At least twenty (20) days prior to trial, each of the parties shall exchange lists stating the names and addresses of all witnesses which each of the parties intends to use in the trial of this cause. The listing of a witness does not commit the party to have such witness available at trial or to call such witness. In the event any of the witnesses are expert witnesses, the list shall include the substance of the opinion of any expert witness (other than medical experts) as provided in Rule 26. However, each of the parties shall not be required to furnish the names of rebuttal witnesses, the necessity for whose testimony such party could reasonably not have anticipated before the time of trial.

ORDERED this 15th day of June, 1984, that the above provisions be binding on all parties unless modified by further order for good cause shown.

/s/ MARVIN CHERNER

Circuit Judge

Copies to:
Frank O. Burge, Esq.
Scott A. Powell, Esq.
Vastine Stabler, Esq.
Jack J. Hall, Esq.

APPENDIX G

IN THE SUPREME COURT OF ALABAMA

Ex parte: BURLINGTON NORTHERN RAILROAD COMPANY	)	
(In Re: NETTIE FAYE DUCKWORTH WARREN, etc.	)	
v.	)	CASE NO. 83-1159
BURLINGTON NORTHERN RAILROAD COMPANY, etc., et al.	)	

APPLICATION FOR REHEARING

Comes now Burlington Northern Railroad Company (hereinafter "Burlington") and petitions this Court to grant it an application for rehearing. A rehearing is necessary to rectify the omissions and analytical errors of the original opinion.

1. The Court failed to properly apply principles of res judicata in this case. The entry of the judgment extinguished the FELA action; the plaintiff's only remaining remedy was the independent action in equity to set aside the judgment. FELA rules therefore should not have been applied.

2. Burlington's right to equal protection of the law was violated in that it was denied the usual expectations of repose extended to other defendants against whom judgments have been entered.

3. Even if this case is characterized as an FELA claim, the Court has overextended the *Dice* opinion. This Court determined that the import of *Dice* is that all traditionally equitable proceedings incidental to an FELA claim are to be tried by a jury. This is simply incorrect. The holding of *Dice*

is that the federal procedural rule will prevail when it conflicts with a local rule. *Dice* does not require a jury trial when the usual federal rule does not.

4. Assuming *arguendo* that federal law provides for a jury trial to set aside a prior final judgment, it is unconstitutional for this rule to be applied to the state court proceedings. Any effort by Congress to usurp the authority of state court judgments through the FELA is prevented by the constitutional doctrines controlling the relationship between federal and state power, now held to be rooted in the Tenth Amendment. Congress knew this and the United States Supreme Court knew this. Only Alabama has ignored these principals. The failure of this Court to address the 10th amendment issue when four of the nine justices in *Dice* stated that the federal legislature did not even have power to regulate the procedure governing the setting aside of a mere release is adequate grounds for granting this application.

Due to the foregoing reasons, this Court must reconsider its decision and grant the application for rehearing.

Respectfully submitted,

/s/ L. VASTINE STABLER, JR.

/s/ KENNETH D. DAVIS

Attorneys for Burlington
Northern Railroad Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Application for Rehearing has been duly served on Mr. Frank O. Burge, Jr., BURGE, FLORIE, POWELL & WETTERMARK, P.C., 1230 First Alabama Bank Building, Birmingham, Alabama 35203-3269, by hand-delivering, this 18th day of January, 1985.

/s/ KENNETH D. DAVIS
OF COUNSEL

APPENDIX H

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 83-1159
EX PARTE: BURLINGTON NORTHERN RAILROAD COMPANY
PETITION FOR WRIT OF MANDAMUS
(Re: Nettie Faye Duckworth Warren, etc.
Appellant

vs.

Burlington Northern Railroad Co., etc., et al.
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

____ Appeal docketed. Future correspondence should refer to the above number.
____ Court Reporter granted additional time to file reporter's transcript to and including
____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including
____ Appell____ granted 7 additional days to file briefs to and including
____ Appellant(s) granted 7 additional days to file reply briefs to and including
____ Record on Appeal filed
____ Appendix Filed
____ Submitted on Briefs
____ Petition for Writ of Certiorari denied. No opinion.
xxxx Application for rehearing overruled. No opinion written on rehearing.
____ Permission to file amicus curiae briefs granted
____

/s/ ROBERT G. ESDALE

Robert G. Esdale, Clerk
Supreme Court of Alabama